Supreme Court, U.S.
FILED
00 142 JUL 24 2000
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 2000

IRIS M. TILLEY, Individually and as Trustee for Tilley Six Trust and T.T. Farms Trust and husband, THOMAS TILLEY; and VIRGINIA MORTGAGE COMPANY

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for Writ of Certiorari To
The Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

Iris M. Tilley, and Thomas E. Tilley, Individually and as Trustee for Tilley Six Trust, T.T. Farms Trust, and Virginia Mortgage
4920 Farrington Rd.
Chapel Hill, NC 27514
(919) 489-2263

46pp

QUESTIONS PRESENTED

I. Whether the Petitioners were deprived of property without due process of law, because the DOT failed to comply with a jurisdictional prerequisite to the exercise of eminent domain.

II. Whether the trial court's ruling that the Petitioners' experts' testimony was legally insufficient, which the Court of Appeals held was erroneous, contributed to the taking of property for less than just compensation.

III. Whether the trial court's exclusion of two of Petitioners' experts' comparable sales, which the Court of Appeals held was erroneous, contributed to the taking of property for less than just compensation.

IV. Whether the jury instructions concerning calculation of just compensation were erroneous and contributed to the taking of property for less than just compensation.

V. The trial court's jury instruction that the Petitioners' were seeking a "substantial sum" contributed to the taking of property for less than just compensation.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

I. PETITIONERS WERE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BECAUSE THE DOT FAILED TO COMPLY WITH A JURISDICTIONAL PREREQUISITE TO THE EXERCISE OF EMINENT DOMAIN 10

II. THE TRIAL COURT'S ERRONEOUS RULING

THAT THE PETITIONERS' EXPERTS' TESTIMONY WAS LEGALLY INSUFFICIENT WAS HARMFUL 13

III. THE TRIAL COURT'S ERRONEOUS EXCLUSION OF TWO OF PETITIONERS' EXPERTS' COMPARABLE SALES WAS HARMFUL 19

IV. THE TRIAL COURT'S JURY INSTRUCTIONS CONCERNING THE CALCULATION OF JUST COMPENSATION WERE ERRONEOUS AND HARMFUL 20

V. THE TRIAL COURT'S JURY INSTRUCTION THAT THE PETITIONERS' WERE SEEKING A "SUBSTANTIAL SUM" WAS HARMFUL . 23

CONCLUSION 24

APPENDIX A
Order of the Supreme Court of North Carolina

APPENDIX B
Opinion of the Court of Appeals of North Carolina

TABLE OF AUTHORITIES

Cases Page

Duke Power Co. v. Mom 'N' Pops Ham House, Inc.
258 S.E.2d 815 (N.C. App. 1979) 21

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles
482 U.S. 304 (1987) 13

Greensboro-High Point Airport Authority v. Irvin
163 S.E.2d 118 (N.C. App. 1968) 10

Guilford County v. Kane
441 S.E.2d 556 (N.C. App. 1994) 19

Highway Commission v. Helderman
207 S.E.2d 720 (N.C. 1974) 17

Redevelopment Commission v. Hagins
128 S.E.2d 391 (N.C. 1962) 11, 12

State Highway Commission v. Matthis
163 S.E.2d 35 (N.C. App. 1968) 10, 12

Statutes and Constitutional Provisions

N.C.G.S. § 136-103 10

N.C.G.S. § 136-112 ..... 13, 19

U.S. CONST. Amend. XIV 9

OPINIONS BELOW

The order of the Supreme Court of North Carolina denying discretionary review is unpublished, and is reprinted in Appendix A.

The opinion of the Court of Appeals of North Carolina is reported as *Department of Transportation v. Tilley*, 524 S.E.2d 83 (N.C. App. 2000), and is reprinted in Appendix B.

JURISDICTION

The denial of discretionary review was filed on May 4, 2000. This petition is therefore timely under Supreme Court Rules 13.1, 13.3, 29.2, & 30.1 if, mailed U.S.P.S. first class, postmarked by August 4, 2000.

This Court has jurisdiction to review the denial of discretionary review by the Supreme Court of North Carolina pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the following constitutional and statutory provisions.

No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. V.

No State shall . . . deprive any person of . . . property, without due process of law.

U.S. CONST. amend. XIV.

(a) In case condemnation shall become necessary the Department of Transportation shall institute a civil action by filing in the superior court of any county in which the land is located a complaint and a declaration of taking declaring that such land, easement, or interest therein is thereby taken for the use of the Department of Transportation.

(b) Said declaration shall contain or have attached thereto the following: . . .

> (2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof. . . .

(c) Said complaint shall contain or have attached thereto the following: . . .

> (2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof.

N.C.G.S. § 136-103.

The following shall be the measure of damages to be followed by the commissioners, jury or judge who determines the issue of damages:

> (1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112.

STATEMENT OF THE CASE

On November 4, 1996, the North Carolina Department of Transportation ("DOT") filed a complaint, and declaration of taking and notice of deposit, condemning and appropriating a portion of Petitioners' property. N.C.G.S. § 136-103(b)(2) & (c)(2) requires that the declaration of taking and the complaint, respectively, contain or have attached to them a "description of the entire tract or tracts affected by said taking." Both the complaint and the declaration of taking described the property subject to the action and the area appropriated by reference to an exhibit. The exhibit described 26.98 acres of Petitioners' property consisting of 23.99 acres north of a "Russett Road," ("north tract") and 2.99 acres south of Russett Road ("south tract"). The described area taken

was 1.25 acres wholly within the south tract. It was undisputed that only the south tract was "affected" by the taking.

N.C.G.S. § 136-112 provides that the measure of damages for a taking "shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking." The Petitioners' expert, William Richardson ("Richardson") testified that the "difference" in the fair market value ("FMV") of the subject property immediately before the taking and after the taking was the difference in the FMVs of the south tract because the FMV of the north tract was unchanged. Richardson specifically testified that he did not research the value of the north tract because it was irrelevant, as a matter of law; explaining his legal rationale. (Trial transcript p. 62, ln. 19 - p. 63, ln. 16).

The trial court was aware that the true affected tract was not that which was described in the complaint and declaration of taking:

> THE COURT: Well, [DOT counsel], if there is a roadway between the northern portion of the property and the southern portion of the property to suggest that he has to appraise the northern portion as well might suggest that if he owed - I mean how is that different than if he owned property on the other side of 15-501 entirely that was separated by a roadway? Why would he not have to appraise the

other side or why would that be necessarily relevant when the only portion of the southern portion of the property is being taken? There is some remaining property, if you accept his testimony. It was 2.26 before the taking south of Russett Road and 1.48.

And so why are we necessarily talking about the whole 26 or 27 acres versus the 2.26 portion that is separated from the northern tract by the existing roadway?

Sidebar on DOT motion to strike Richardson's testimony. (Trial transcript p. 70, ln. 16 - p. 71, ln. 8). The trial court, however, concluded that Petitioners were bound by their counsel's stipulation that the affected property was the whole 27 acres. (Trial transcript p. 79, lns. 5-10). The court instructed the jury that the stipulation required it to consider both the north and south tracts as the "property affected" by the taking. (Trial transcript p. 271, ln. 20 - p. 272, ln. 12).

The trial court ruled that Richardson did not give a FMV of the entire tract before the taking or a FMV of the remainder after the taking, as allegedly required by statute. The court stated that a failure to specify those FMVs creates a problem in terms of burden of proof. The court opined that the jury may not be able to fulfill its duty "to find the [FMV] of the property immediately prior to the taking and the [FMV] of the remainder immediately after the taking" on the then present record, and gave Petitioners a fifteen minute recess to consider further testimony.

Thereafter, Richardson added to his testimony by calculating the before and after FMVs of the subject property. The DOT inquired into the fact that Richardson determined those FMVs during the recess. The DOT inquiry drew further attention to the fact that Richardson believed the additional information required by the trial court was legally unnecessary. Then, the DOT stated that the law was contrary to Richardson's belief. At the end of the cross-examination, the DOT again sought to inquire as to when Richardson completed his appraisal; an objection was sustained.

The trial court three times instructed the jury that in order to determine the "difference" in the FMV, they were required to specifically determine a FMV of the subject property for both before and after the taking and subtract the after value from the before. (Trial transcript p. 274, ln. 11 - p. 276, ln. 23).

Richardson sought to introduce evidence of five comparable sales to support his determination of the FMV of the south tract. The trial court struck the testimony concerning the fourth comparable sale and sustained an objection to the fifth comparable sale solely because those sales were chronologically after the taking of Petitioners' property. (Trial transcript. p. 50, ln. 4 - p. 53, ln. 9). Petitioners' trial counsel argued these two comparable sales were admissible to calculate the FMV of the south tract. *Id.*

Richardson testified that the loss arising from the

taking was $180,800. Also using comparable sales, the DOT's two expert witnesses calculated the loss at $13,500 & $7,525. Based on his business experience and knowledge of the property, Petitioner Thomas Tilley ("Tilley") estimated the loss at $180,000. The vast difference in the values arose solely from a difference of opinion as to whether the Petitioners could have accessed a sewer line traversing the south tract. The trial court instructed the jury that the Petitioner sought a "substantial sum."

The jury awarded $13,500 as just compensation for the taking.

Petitioners timely appealed to the Court of Appeals of North Carolina. The Petitioners raised the following arguments: (1) the proceeding was void for lack of jurisdiction, because the complaint and declaration failed to meet the strictly scrutinized statutory prerequisites to exercising the powers of imminent domain. The complaint failed to properly describe the tract affected by the taking: the south tract (App. B3-4); (2) requiring Richardson to recalculate his damages by including the northern tract was error that harmed the credibility of Petitioners' expert (App. B-6); (3) excluding Richardson's two comparable sales was error that harmed the credibility of Petitioners' expert (App. B-9); (4) instructing the jury that the trial stipulation was binding on the question of what tract was affected by the taking was error, because stipulations are not binding on questions of law (App. B-12); (5) instructing, three times, that specific before and after

FMVs must be determined was error, because the statute requires only that a "difference" in the FMVs be found and this error further harmed Richardson's credibility before the jury (App. B-12); and (6) instructing the jury that the Petitioners' sought a "substantial sum" was error, because it further prejudiced the jury (App. B-13). (Appeal Brief).

The Court of Appeals of North Carolina held as follows: (1) the failure to properly described the property affected by the taking was not a jurisdictional defect (App. B3-6); (2) the trial court erred requiring Richardson to modify his just compensation calculation, but the error resulted in no prejudice (App. B6-9); (3) the trial court erred by excluding Richardson's two comparable sales, but the error resulted in no prejudice (App. B9-12); (4) the jury instruction concerning the stipulation was correct, because it did not address a jurisdictional question (App. B-12); (5) the jury instructions concerning calculating just compensation were proper (App. B12-13); and (6) the use of the word "substantial" in the jury instructions did not carry a negative connotation (App. B-13).

Petitioners timely filed a petition for review to the Supreme Court of North Carolina. The petition asked the Court to certify the following questions for review in this land condemnation case:

> 1. Whether the Court of Appeals erred holding that the failure of the [DOT] to comply with the "exclusive procedure for the institution" of a condemnation action under [N.C.] G.S. § 136-103

is not a jurisdictional issue considering [the Supreme] Court [of North Carolina] has said it is.

2. Whether the Court of Appeals erred holding that the trial court's erroneous determination that [Petitioners'] expert's testimony was legally insufficient, thus compelling the expert to modify his testimony, was harmless error considering that credibility was at a premium because the entire case turned on a single fact question based on opinion evidence and the additional harm addressed in questions three through five.

3. Whether the Court of Appeals erred holding that the trial court's erroneous exclusion of two of [Petitioners'] expert's five comparable sales was harmless error considering credibility was at a premium because the entire case turned on a single fact question based on opinion evidence and the additional harm addressed in questions two, four, and five.

4. Whether the Court of Appeals erred affirming jury instructions specifically requiring the jury to (1) calculate a FMV of [Petitioners'] property before the taking, (2) calculate a FMV after the taking, and then (3) subtract the second FMV from the first, when (1) the property includes two tracts, (2) one tract's value was unaffected by the taking, and (3) statutory damages are defined as merely the "difference" in the before and after

FMV.

5. Whether the Court of Appeals erred holding that a jury instruction characterizing [Petitioners'] claim of damages as "substantial" did not add to the harm resulting from the other trial errors.

(Petition for Review).

The Supreme Court of North Carolina denied discretionary review. (App. A).

REASONS FOR GRANTING THE WRIT

I. PETITIONERS WERE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BECAUSE THE DOT FAILED TO COMPLY WITH A JURISDICTIONAL PREREQUISITE TO THE EXERCISE OF EMINENT DOMAIN.

No State shall deprive any person of property, without due process of law. U.S. CONST. amend. XIV. It is self-evident that the taking of property without lawful authority does not comport with due process.

This case involves the DOT's exercise of the State's power of eminent domain. "The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed." *Greensboro-High Point Airport Authority v. Irvin*, 163 S.E.2d 118, 121 (N.C. App. 1968). N.C.G.S. § 136-103

sets out the exclusive procedure for the institution of this action. *State Highway Commission v. Matthis*, 163 S.E.2d 35, 39 (N.C. App. 1968). N.C.G.S. §§ 136-103(b)(2) & (c)(2) require that the declaration of taking and the complaint, respectively, contain or have attached to them a "description of the entire tract or tracts affected by said taking."

It was undisputed that the description attached to the declaration and complaint in this case includes two tracts of land separated by an existing roadway and that the north tract was not affected by the taking. Not only is this factually unchallenged, but Petitioners argued at trial and on appeal that it is so as a matter of law. Petitioners, however, represented by counsel, stipulated that the only issue to be resolved at trial was that of compensation. On appeal, Petitioners, pro se, argued that the DOT's failure to comply with N.C.G.S. § 136-103 deprived the court of subject matter jurisdiction (SMJ), that the court could not acquire SMJ by stipulation, and that SMJ could be raised at any time.

The Court of Appeals of North Carolina denied relief, relying on the general principle that a court has SMJ "if it has the power to hear and determine cases of the general class to which the action in question belongs." (App. B-4). The Supreme Court of North Carolina, however, has made clear that a court does not have jurisdiction over an eminent domain action unless the State's complaint complies with the statutory prerequisites. *Redevelopment Commission v. Hagins*, 128 S.E.2d 391, 394 (N.C. 1962).

In *Hagins*, the petition failed to comply with all the statutory prerequisites to an eminent domain action. *Id.* Discussing the relevant principles, the court said:

> It is said that, although the petition in this case fails to allege the performance of these [statutory] conditions, the omission is not fatal, and that it is but a defective statement of a good cause of action. We do not concur in this view. The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. By the very terms of the law under consideration, these allegations must be made in the petition, and we think they are as much jurisdictional in their character as is the fact that the landowner and the railroad company have failed to agree. "If the petition does not state the facts required by the statute to be stated, an objection in that regard can be raised preliminarily . . . by way of demurrer, . . ."
>
> The petitions in these proceedings were fatally defective. The respondents were permitted to file demurrers *ore tenus* challenging the sufficiency of the petition. Even without the demurrers, it would be our duty *ex mero muto* to take notice of the defects which appear upon the face of the record.

Hagins, 128 S.E.2d at 394 & 395. Relying on *Hagins*, the Court of Appeals of North Carolina has specifically held the provisions of N.C.G.S. § 136-103 to be jurisdictional.

Matthis, 163 S.E.2d at 40-41 (holding an alleged omission in the complaint not to be jurisdictional because it was not required by N.C.G.S. § 136-103).

The Court of Appeals of North Carolina also relied on the fact that the statutes provide "a mechanism for resolving disputes over issues other than just compensation," and that Petitioners failed to avail themselves of that mechanism to deny relief. (App. B-5). The short response is that mechanisms to resolve collateral issues when a court has jurisdiction does not, *ipso facto*, cure jurisdictional defects.

Because the Supreme Court of North Carolina denied review, Petitioners' property has been taken without jurisdiction, in violation of due process of law. Because the rule established below allows the taking of property without statutory authority to do so, the Court should issue a writ of certiorari.

II. THE TRIAL COURT'S ERRONEOUS RULING THAT THE PETITIONERS' EXPERTS' TESTIMONY WAS LEGALLY INSUFFICIENT WAS HARMFUL.

The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation," and applies to the States through the Fourteenth Amendment. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 310 n.4 (1987).

Just compensation is determined as follows:

> The following shall be the measure of damages to be followed by the commissioners, jury or judge who determines the issue of damages:
>
> (1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112.

Richardson calculated this difference by determining the difference in the FMVs of the south tract. He determined that because the FMV of the north tract was unchanged, its value had no consequence in calculating the difference required by N.C.G.S. 136-112(1). Furthermore, he testified that the FMV of the north tract was irrelevant as a matter of law.

The DOT moved to strike Richardson's testimony as inadmissible, because he did not separately specify FMVs for the subject property before the taking and the remainder after the taking. Petitioners countered that the statute requires only the "difference" be determined, not specific before and after values, and that the testimony

allows the jury to determine that difference.

The trial court agreed with the DOT and forced Richardson to modify his testimony to include the north tract, which Richardson had previously testified at length was immaterial. After Richardson's modified his testimony, the DOT took advantage of the change in Richardson's testimony required by the trial court's ruling to discredit his competence in the eyes of the jurors as follows:

> Q When did you complete your appraisal?
> A About ten minutes ago.
> Q You completed it during the break, didn't you?
> A Yes. Absolutely.
> Q And prior to then you hadn't finished your appraisal?
> A Prior to then I had finished my appraisal –
> Q Answer the question.
> A – as far as appraisal technique is concerned. Based on your objections, I added additional acreage which I had comparable sales on and have come up with a figure for the entire acreage. I do not think that is the relevant larger tract, but that's my appraisal opinion and I'm trying to conform myself to what you have asked and what the judge has demanded. And, yes, I - I took sales that Mr. Tilley has previously informed

> me about and those are my comparable sales for the entire appraisal. These are sales that Mr. Tilley made on - himself to other parties.
> Q How many times have you testified in court on a condemnation case?
> A In ten years, maybe twelve, fourteen. I haven't done any work in the last four years because I have been very sick and have been unable to work. I have only been working again for about the last six months.
> Q The requirement is not my requirement. That's what the law is. [Objection sustained]

(Trial transcript p. 92, ln. 21- p. 93, ln. 24). At the end of the cross-examination, the DOT again sought to inquire as to when Richardson completed his appraisal:

> Q Mr Richardson, when did you complete your appraisal?
> [Petitioners' counsel]: Objection. Asked and answered.
> THE COURT: Sustained
> [DOT counsel]: I don't have any further questions, Judge.

(Trial transcript p. 104, lns. 6-12).

The Court of Appeals of North Carolina held the district court's ruling was erroneous. (App. B6-8).

However, the error was held harmless, because Petitioners' failed to meet their burden to demonstrate a different result would have been likely had the error not occurred. (App. B8-9). The Court of Appeals of North Carolina thought Richardson's credibility "may have [been] impugned," but did not believe his credibility was damaged with respect to the ultimate issue. (App. B-9). The Court of Appeals of North Carolina' distinction is misplaced.

To understand the harm, one must first understand the factual dispute in determining just compensation. The DOT had two experts that calculated the damage at approximately $10,000. Richardson and Tilley calculated the damage at approximately $180,000. The difference is based solely on the fact question of whether the Petitioners could have accessed a sewer line that went through the south tract. Because of local governmental turnover and the discretionary factors involved in approving access to the sewer, only opinion evidence was available on the issue. The DOT experts gave an opinion that Petitioners could not have accessed a sewer connection, while Richardson and Tilley opined they could.

Richardson's testimony is crucial because a jury is unlikely to give Tilley's opinion any weight.[1] Any

---

1. "It is generally understood that the opinion of the owner is so far affected by bias that it amounts to little more than a definite statement of the maximum figure

(continued...)

"impugning" of his credibility seriously increases the likelihood that the jurors would not credit his testimony. It goes without saying that crediting Richardson's opinion testimony would likely give a different result in this case because the ultimate fact depended solely on opinion testimony.

As the Court of Appeals of North Carolina stated, Richardson's credibility was impugned. It focused in, however, on the fact that the resulting damage under either method, according to Richardson, was the same. (App. B-9). The North Carolina Court of Appeals' analysis misses the fact that credibility is the crucial factor, not whether the error caused Richardson to come up with two different amount of damages. The combination of the trial court's ruling and the DOT cross-examination made Richardson appear incompetent. He appeared (1) not to know the law relevant to his testimony, (2) to have testified unprepared, (3) to be unwilling to change his view of the law after the court disagreed with him, and (4) to have quickly changed his testimony because the court ordered him to.

Without the harm to Richardson's credibility, the jury would have returned a different amount of damages. The fact that there is such a disparity between the opposing damage calculations supports the view that the jury would

---

1. (...continued)
of his contention." *Highway Commission v. Helderman*, 207 S.E.2d 720, 725 (1974).

have awarded a higher amount as just compensation if it thought Richardson was more credible. The fact that the jury awarded the maximum damage calculation of the two DOT expert witnesses, despite the harm to Richardson's credibility, gives more support to the conclusion that just compensation was not awarded.

Because of the near certainty that just compensation was not awarded, the Court should issue a writ of certiorari.

III. THE TRIAL COURT'S ERRONEOUS EXCLUSION OF TWO OF PETITIONERS' EXPERTS' COMPARABLE SALES WAS HARMFUL.

The trial court also excluded Richardson's testimony about two comparable sales solely because the sales were subsequent to the taking in question. Thus, Richardson only got three of his five comparable sales into evidence. The Court of Appeals of North Carolina held this was error. (App. B10-11). The Court of Appeals of North Carolina held the error harmless, however, because "Richardson was adequately able to support his appraisal opinion through the three other sales." (App. B11-12).

Again, the Court of Appeals of North Carolina missed the critical issue. The question is not whether five comparable sales would have garnered a different result as opposed to three sales. The question is whether Richardson's credibility was reduced to an extent that it was likely to have affected the just compensation award.

Once again, the trial court's error made Richardson appear to be unqualified before the jury. Forty percent of what Richardson considered to be a basis to support Petitioners' position was improperly held by the court, in front of the jury, to be inadmissible.

Because without this harm to Richardson's credibility the jury would likely have returned a greater amount as just compensation, the Court should issue a writ of certiorari.

IV. THE TRIAL COURT'S JURY INSTRUCTIONS CONCERNING THE CALCULATION OF JUST COMPENSATION WERE ERRONEOUS AND HARMFUL.

A. Legal Interpretation.

Again, "the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking." N.C.G.S. § 136-112. It is an indisputable mathematical fact that when calculating the "difference" in the before and after FMVs of two tracts of property, one of which had no difference in value, the difference can be determined by considering only the tract whose FMV changes. "The logical consequence of assuming that only the 7.7 acre area [out of a 32.6 acre tract] was affected is that the diminution in its value will necessarily equal the diminution in value of the 'entire tract.'" *Guilford County v. Kane*, 441 S.E.2d

556, 557-58 (N.C. App. 1994).

The trial court, however, three times instructed the jury that to determine the "difference" in the FMV of the entire tract prior to the taking and the remainder after, they must specifically determine the FMVs before and after of the entire tract:

> To resolve this matter, it will be your duty to find the [FMV] of the property immediately prior to the taking and the [FMV] of the remainder immediately after the taking.

(Trial transcript p.274, lns. 11-15).

> In arriving at the value for the property immediately before the taking you should . . . .
>
> Likewise, in arriving at the value of the remainder immediately after the taking, you should . . . .

(Trial transcript p.274, lns. 16-25).

> Therefore, members of the jury, you should first determine the [FMV] of the entire tract of land belonging to the [Petitioners] immediately prior to the date of taking by the plaintiff . . . .
>
> Next, you should determine the [FMV] of the remainder of the [Petitioners'] property

immediately after the taking . . . .

The difference between these two figures as determined by you in dollars and cents will be your answer to this issue.

(Trial transcript p. 275, ln. 25 - p. 276, ln. 23).

The Court of Appeals of North Carolina affirmed the instructions because "our legislature has outlined a specific formula that must be used by juries in assessing the value of any land taken," citing N.C.G.S. § 136-112. (App. B-13). Yet, nothing in the law requires the jury to (1) find a FMV before the taking of the entire tract, (2) a FMV of the remainder after the taking, and (3) subtract 2 from 1 to arrive a the difference. *Duke Power Co. v. Mom 'N' Pops Ham House, Inc.*, 258 S.E.2d 815, 819 (N.C. App. 1979). The jury must merely find the difference. Everyone knows that if they are carrying money in both their pants pockets and only spend money out of the left pocket, they do not need to know how much money is in their right pocket to answer the question, "what is the difference between the money you now have and how much you had this morning."

Therefore, the Court of Appeals of North Carolina affirmed improper jury instructions by misinterpreting N.C.G.S. § 136-112.

B. Harm.

These instructions reinforce, three times, the jurors' perception from arguments 2 & 3 above that Richardson was incompetent because the instructions make it appear that Richardson misunderstood the law of how to determine damages; the very field his expert opinion was sought concerning. Even if the trial court's interpretation of the law and instruction were proper, its instructing on it three times constitutes harmful error when done subsequent to the erroneous evidentiary rulings at trial.

Because without this harm to Richardson's credibility the jury would likely have returned a greater amount as just compensation, the Court should issue a writ of certiorari.

V. THE TRIAL COURT'S JURY INSTRUCTION THAT THE PETITIONERS' WERE SEEKING A "SUBSTANTIAL SUM" WAS HARMFUL.

The trial court instructed the jury that the damages sought by the Petitioners were "substantial":

> On this issue the [Petitioners] and the plaintiff have difference positions. The [Petitioners] contend that you should answer this issue in a substantial sum . . . .

(Trial transcript p. 276, ln. 24 - p. 277, ln. 2). The Court of Appeals of North Carolina affirmed the instruction finding

the word "substantial" to be "purely descriptive." (App. B-13).

While descriptive language might normally be innocuous, the use of the word "substantial" in the instant instructions aggravates the cumulative harm arising from the errors discussed above. A juror could reasonable view the term as commenting on the weight of the evidence.

Because without this harm to Richardson's credibility the jury would likely have returned a greater amount as just compensation, the Court should issue a writ of certiorari.

CONCLUSION

For each and the cumulative effect of all of the above grounds, a writ of certiorari should issue.

The decisions below should be reversed.

Respectfully submitted,

Iris M. Tilley, and Thomas E. Tilley, Individually and as Trustee for Tilley Six Trust, T.T. Farms Trust, and Virginia Mortgage
4920 Farrington Rd.
Chapel Hill, NC 27514
(919) 489-2263

July 20, 2000.

APPENDIX A

No. 75P00 FIFTEEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(*DOT v Tilley et al*)

DEPARTMENT OF TRANSPORTATION

v

IRIS M. TILLEY, Individually and as Trustee for Tilley Six Trust and T.T. Farms Trust and husband, THOMAS TILLEY; and VIRGINIA MORTGAGE COMPANY

From NC Court of Appeals
(COA99-319)
From Chatham
(96CVS0638)

****

ORDER

Upon consideration of the petition filed by Defendants Pro Se in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals.

"Denied by order of the Court in conference, this the 4th day of May 2000.

s/ Freeman, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of May 2000.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

s/ Carol B. Templeton
Assistant Clerk

[SEAL]

APPENDIX B

DEPARTMENT OF TRANSPORTATION, Plaintiff, v. IRIS M. TILLEY, Individually and as Trustee for Tilley Six Trust and T.T. Farms Trust and husband, THOMAS TILLEY; and VIRGINIA MORTGAGE COMPANY, Defendants.

NO. COA99-319

COURT OF APPEALS OF NORTH CAROLINA

524 S.E.2d 83

January 18, 2000, Filed

PRIOR HISTORY: Appeal by defendants from judgment entered 6 July 1998 by Judge David Q. LaBarre in Chatham County Superior Court.

DISPOSITION: No prejudicial error.

CORE TERMS: entire tract, acre tract, formula, tract, acre, subject matter jurisdiction, calculation, appraiser, fair market value, unaffected, post-taking, date of taking, real estate, highway, comparable, condemned, recess, different result, remote, fair market values, cross-examination, condemnation, credibility, valuation, pre-trial, northern, condemn, map, new trial, admissible

COUNSEL: Attorney General Michael F. Easley, by Assistant Attorney General Emmett B. Haywood, for

plaintiff-appellee.

Iris M. Tilley for defendant-appellant Iris M. Tilley and Thomas E. Tilley for defendant-appellants Thomas E. Tilley, Tilley Six Trust, T.T. Farms, and Virginia Mortgage Company.

JUDGES: LEWIS, Judge. Judges WYNN and MARTIN concur.

OPINIONBY: LEWIS

OPINION: **[85]**

LEWIS, Judge.

This case arises from a land condemnation hearing in which plaintiff sought to take a portion of defendants' property in order to widen a part of Highway 15-501 in Chatham County. Defendants appeal from a verdict in which the jury awarded them $13,500 as just compensation for the taking.

Defendants own a 26.98-acre tract of land in Chatham County. Russett Road, a private road built for the University of North Carolina Center for Autistic Children, traverses this tract, separating it into a 23.99-acre northern tract ("the Northern Tract") and a 2.99-acre southern tract ("the Southern Tract"). On 4 November 1996, plaintiff filed a Declaration of Taking, seeking to condemn a portion of defendants' property for highway construction.

The Declaration of Taking described the tract affected by the taking as the entire 26.98-acre tract; it described the area to be actually taken as a 1.25-acre portion of the Southern Tract. The Northern Tract was to remain unaffected.

After extensive discovery, the trial court entered a pre-trial order on 9 June 1998 that contained many of the parties' pre-trial stipulations. One such stipulation stated:

The only issue in this case will read as follows:

"What sum are the defendants entitled to recover from the plaintiff, Department of Transportation, as just compensation for the appropriation of a portion of their property for highway purposes on November 4, 1996?"

The matter then proceeded to trial before a jury for a determination of that issue. At trial, plaintiff submitted the testimony of two expert real estate appraisers. John McCracken valued the 1.25-acre tract at $13,500. Lindsay Dean appraised it at $7525. Defendants submitted two valuations. Their expert appraiser, William Richardson, appraised the land at $180,800. Defendant Thomas Tilley, based upon his own experience and knowledge of the property, then testified that the tract was worth $180,000. On 12 June 1998, the jury returned a verdict awarding defendants $13,500. Defendants now appeal.

[86] Defendants first argue that the jury verdict must be

voided because the trial court did not have subject matter jurisdiction in this action. Specifically, they contend that plaintiff's Declaration of Taking was inherently flawed in its description of the property to be affected by the taking such that the trial court never acquired jurisdiction over the property plaintiff was seeking to condemn.

To fully understand defendants' argument, we must first outline the relevant pleading requirements for any Declaration of Taking filed by the Department of Transportation. Among other things, such Declaration must include:

(2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof.

(3) A statement of the estate or interest in said land taken for public use and a description of the area taken sufficient for the identification thereof.

N.C. Gen. Stat. § 136-103 (amended 1998) (emphasis added). Defendants argue that, because the 23.99-acre Northern Tract was not affected by the taking, the "entire tract or tracts affected" here was just the 2.99-acre Southern Tract. Because plaintiff's Declaration of Taking did not correctly list the requisite entire tract affected, defendants maintain that the trial court did not have subject matter jurisdiction over the property to be taken. We find this argument to be contrived and without merit. "A court has jurisdiction over the subject matter if it has the power to hear and determine cases of the general class to which

the action in question belongs." *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 324, 244 S.E.2d 164, 165 (1978). Our legislature has expressly conferred jurisdiction over condemnation matters on our superior courts. N.C. Gen. Stat. § 136-103(a) (amended 1998). As this action was instituted in Chatham County Superior Court, the trial court did have jurisdiction over the subject matter here.

In reality, defendants are contesting the propriety of the pleadings, not the propriety of the court's jurisdiction. In particular, defendants are alleging that the "entire tract or tracts affected" here is just the Southern Tract, not the entire 26.98-acre tract. This issue should have been litigated, if at all, before trial. A condemnation hearing should proceed to trial only after all issues other than that of just compensation have been resolved -- "[a] controversy as to what land a condemnor is seeking to condemn has no place in a condemnation proceeding." *Light Company v. Creasman*, 262 N.C. 390, 397, 137 S.E.2d 497, 502 (1964). Our legislature has specifically provided a mechanism for resolving disputes over issues other than just compensation. See N.C. Gen. Stat. § 136-108 (1999). The fact that a trial court's determination as to any of these other issues is immediately appealable, see *Highway Commission v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967), reinforces the notion that our courts want all issues to be resolved before the matter of just compensation is even addressed. Here, defendants failed to avail themselves of the mechanism provided in section 136-108, and instead specifically stipulated that only the matter of just compensation remained for

resolution at trial. We will not reward this failure on appeal.

It is quite apparent to this Court that defendants have couched their argument in terms of subject matter jurisdiction in order to circumvent their pre-trial stipulation. Defendants correctly point out that subject matter jurisdiction cannot be consented to or stipulated to. *Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973). But defendants' stipulation here had nothing to do with subject matter jurisdiction; it had to do with the issues to be resolved at trial. Defendants will not be allowed to create an issue of subject matter jurisdiction merely by phrasing it as one. The issue defendants are arguing involves the amount of affected property. As previously stated, this issue must be resolved before trial and will not be entertained on appeal from a verdict as to just compensation.

Next, defendants argue that the trial court erred by requiring their expert appraiser to calculate the value of the 1.25-acre tract taken according to the strict formula **[87]** set out by our legislature in N.C. Gen. Stat. § 136-112(1). In appraising the property taken, Mr. Richardson testified that he compared the fair market value of the Southern Tract before the taking with the fair market value of the Southern Tract after the taking to arrive at a difference of $180,800. He testified that he did not attempt to value the Northern Tract because it was unaffected by the taking. Plaintiff thereafter objected to his testimony as

incompetent because he did not follow the statutory formula. That formula provides:

> The following shall be the measure of damages to be followed by the commissioners, jury or judge who determines the issue of damages:
>
> (1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C. Gen. Stat. § 136-112 (1999) (emphasis added). Because Mr. Richardson only valued a portion of the entire 26.98-acre tract (namely the Southern Tract), the trial court instructed him to re-appraise the property according to the statutory formula. A fifteen-minute recess was then taken so that he could value the Northern Tract and add it to his calculations. He did so, and then continued his testimony to the jury pursuant to the statutory formula. By requiring Mr. Richardson to follow the strict statutory formula, we conclude the trial court erred. Nonetheless, we hold that the error resulted in no prejudice to defendants.

Expert witnesses, including real estate appraisers, must be given wide latitude in formulating and explaining their opinions as to value. *Power Co. v. Ham House, Inc.*, 43

N.C. App. 308, 312, 258 S.E.2d 815, 819 (1979). An expert is not restricted to any one specific measure or calculation. See *Board of Transportation v. Jones*, 297 N.C. 436, 439, 255 S.E.2d 185, 187 (1979) (listing three acceptable formulas). Section 136-112(1) does specify only one permissible calculation for the jury to use. Significantly, however, that section speaks only to the exclusive measure of damages to be used by the "commissioners, jury or judge"; in no way does it seek to restrict expert real estate appraisers to one particular method of ascertaining the fair market value of the property taken. *Id.* at 438, 255 S.E.2d at 187. Thus, "in situations where elements of the property, such as the [Northern Tract] here, will remain constant in value despite the taking, expert appraisers will not have to include that value in their computations in order for their testimony to be competent." *Ham House*, 43 N.C. App. at 313, 258 S.E.2d at 819. After all, "the logical consequence of assuming that only the [2.99] acre area was affected is that the diminution in its value will necessarily equal the diminution in value of the 'entire tract.'" *Guilford County v. Kane*, 114 N.C. App. 243, 246, 441 S.E.2d 556, 557 (1994). Accordingly, the trial court should not have required Mr. Richardson to re-appraise the 1.25-acre tract according to the restrictive formula outlined in the statute.

Despite the trial court's erroneous demand, we do not feel defendant is entitled to a new trial. In order to receive a new trial on appeal, defendants must not only show error, but must show that they were prejudiced as a result. *Hasty v. Turner*, 53 N.C. App. 746, 750, 281 S.E.2d 728, 730

(1981). In order to establish prejudice, defendants must demonstrate "that a different result would have likely ensued had the error not occurred." *Id.* Defendants have not met that burden here.

In his original testimony, Mr. Richardson explained to the jury that he did not take into account the Northern Tract because its value remained unaffected by the taking. After the trial court required him to take that tract into account, a recess was given so that he could value the Northern Tract. After the recess, he explained to the jury his amended calculations, but again pointed out that the resultant value of the 1.25-acre tract was still the same, regardless of his appraisal value as to the Northern **[88]** Tract. Given that he was permitted to complete his calculations and that his calculations in no way changed his ultimate appraisal value of the 1.25-acre tract, we do not believe defendants have shown that a different result would have likely occurred absent the error.

We do note that, on cross-examination, plaintiff's counsel attempted to undermine Mr. Richardson's credibility by pointing out that his appraisal of the Northern Tract was only done during the fifteen-minute recess. Absent the trial court's error, of course, such cross-examination would not have been possible since Mr. Richardson should not have been required to appraise the unaffected Northern Tract in the first place. Although this cross-examination may have impugned Mr. Richardson's credibility with respect to his specific valuation of the Northern Tract, we do not believe it damaged his

credibility with respect to the ultimate issue in this case -- the valuation of the land actually condemned.

In another assignment of error, defendants contest the exclusion of certain testimony by Mr. Richardson regarding two purportedly comparable real estate sales. In appraising the property taken, Mr. Richardson looked at five voluntary sales of similar property. These sales occurred on 30 September 1994, 19 May 1996, 17 November 1996, 5 September 1997, and sometime in November of 1997. Plaintiff sought to exclude all testimony regarding the two sales from 1997 solely because they occurred after the date of taking. The trial court agreed and limited Mr. Richardson's testimony to the three other sales.

When the value of property is directly at issue, voluntary sales of property similar in nature, location, and condition to the land involved in the suit are admissible as circumstantial evidence of the condemned land's value, so long as the voluntary sales are not too remote in time. *Power Co. v. Winebarger*, 300 N.C. 57, 65, 265 S.E.2d 227, 232 (1980). Whether the properties are sufficiently similar is a matter within the sound discretion of the trial court. *City of Winston-Salem v. Cooper*, 315 N.C. 702, 711, 340 S.E.2d 366, 372 (1972). We conclude that the trial court abused its discretion here because it excluded the two 1997 sales solely because they occurred after the date of taking.

Plaintiff contends, and the trial court apparently agreed,

that any voluntary sales occurring after the date of taking, such as the two 1997 sales here, are per se excludable. We disagree with plaintiff's stringent interpretation of the law in this State. Our courts have only required that the similar sales not be too remote in time from the date of the taking; nowhere have we affirmatively required that the sales also be prior to the taking. Plaintiff nonetheless relies on the following language from our Supreme Court to support its interpretation:

> It is the rule in this State that the price paid at voluntary sales of land, similar in nature, location, and condition to the condemnee's land, is admissible as independent evidence of the value of the land taken if the prior sale was not too remote in time.

State v. Johnson, 282 N.C. 1, 21, 191 S.E.2d 641, 655 (1972) (emphasis added). We conclude that plaintiff's reliance on the "prior sale" language is misguided. A careful reading of Johnson reveals that our Supreme Court intended to attribute no significance to the word "prior." In Johnson, three purportedly comparable sales were used to assess the value of condemned land. *Id.* at 8, 191 S.E.2d at 649. One of these sales occurred after the date of taking. Id. Ultimately, however, the Supreme Court did not exclude this sale because it post-dated the taking, instead excluding it because it was sold to a prospective condemnor and thus was not truly a voluntary sale. *Id.* at 23, 191 S.E.2d at 656. Had our Supreme Court intended the "prior sale" language to affirmatively establish a requirement that all comparable sales must pre-date the

taking, it surely would have used that requirement to exclude the one post-taking sale there. Accordingly, we conclude that there is no affirmative requirement that any comparable sales must occur prior in time to the taking. By excluding the two 1997 sales solely on those grounds, the trial court erred.

Notwithstanding the erroneous exclusion of these two sales, we again discern **[89]** no prejudice to defendants. We conclude that Mr. Richardson was adequately able to support his appraisal opinion through the three other sales. The addition of the two 1997 sales would not have bolstered his opinion in such a way that a different result would have likely occurred.

Next, defendants assign error to the trial court's jury instruction. In its instruction, the trial court explained to the jury that the map used by the parties at trial accurately reflected the entire tract affected by the taking. That map included both the Northern and Southern Tracts. Defendants maintain that, because only the Southern Tract was actually affected by the taking, only it constituted the entire tract affected. As such, they contend that the trial court should not have referred to the entire map in its instructions, but just the 2.99-acre Southern Tract. We dismiss this argument for the same reasons we dismissed defendants' first argument. The issue of what constitutes the entire tract affected should have been resolved before trial through the procedures outlined in section 136-108. By not availing themselves of these procedures and instead stipulating that only the issue of just compensation

remained for trial, defendants will not be allowed to come forward now and suggest that only the Southern Tract constituted the entire tract affected by the taking.

Defendants also argue that the trial court erred by instructing the jury to value the 1.25-acre tract taken by calculating the difference between the pre- and post-taking fair market values of the entire 26.98-acre tract. Defendants contend that, because the Northern Tract remained unaffected, the jury should have been permitted to just use the pre- and post-taking fair market values of the 2.99-acre Southern Tract. Again, we reject this argument. As articulated earlier, our legislature has outlined a specific formula that must be used by juries in assessing the value of any land taken. That formula requires differentiating the pre- and post-taking fair market values of the entire tract affected. N.C. Gen. Stat. § 136-112(1) (1999). Accordingly, the trial court instructed the jury properly on the formula it was to use.

Finally, defendants contend that the trial court improperly influenced the jurors by telling them, as part of its instructions, that defendants were seeking "substantial" damages. Specifically, the trial court told the jury:

On this issue [of the condemned property's value] the defendants and the plaintiff have different positions. The defendants contend that you should answer this issue in a substantial sum and have presented evidence which tends to show that the value of the entire tract immediately prior to the taking was $305,000, while the value of the

remainder immediately after the taking was $125,000.

(Tr. at 276-77) (emphasis added). We fail to see any error in merely including the term "substantial" in the instruction. As used here, "substantial" is purely descriptive in nature and does not carry with it the negative connotation defendants would have us believe. Accordingly, we reject defendants' final argument.

No prejudicial error.

Judges WYNN and MARTIN concur.